Supreme Court, U.S.
FILED

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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

ANTHONY MACALUSO,

Petitioner,

v.

DERRICK ANDERSON, dba,
ANDERSON STUDIOS,

Respondent,

INDUSTRIAL COMMISSION OF ARIZONA, SPECIAL FUND DIVISION/NO INSURANCE SECTION,

Respondent Party in Interest.

Petition For A Writ Of Certiorari To The Arizona Supreme Court

PETITION FOR WRIT OF CERTIORARI

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70 pp

QUESTIONS PRESENTED

1. Whether the *Due Process Clause* of the *Fourteenth Amendment to the United States Constitution* was violated when a state denied an injured worker any compensation for a compensable claim due to his attorney's failure to obtain the insurance carrier's approval before settling a third-party claim, where no forfeiture provision existed in the applicable statute.

2. Whether the *Equal Protection Clause* of the *Fourteenth Amendment to the United States Constitution* was violated by interpreting a statute which created two classes of workers' compensation claimants and which provides no protection to one class, where there is no rational basis for the distinction.

3. Whether the *Due Process Clause* of the *Fourteenth Amendment to the United States Constitution* was violated by the enactment of a statute that is vague in that it expresses no penalty for a specified procedural violation, where such violation resulted in a total forfeiture of an otherwise constitutionally guaranteed property right.

PARTIES TO THE PROCEEDING

The parties to the proceeding below were Anthony Macaluso, Derrick Anderson, dba, Anderson Studios, Industrial Commission of Arizona, Special Fund Division/No Insurance Section.

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Petitioner Anthony Macaluso requests that a writ of certiorari issue to review the final order of the Supreme Court of the State of Arizona.

OPINIONS BELOW

The final order of the Supreme Court of Arizona is unpublished and is reproduced in the Appendix ("App.") at 1. The initial order of the Supreme Court of Arizona granting review is unpublished and is reproduced at App. 13. The opinion of the Court of Appeals of the State of Arizona, Division One is reported as 181 Ariz. 447, 891 P.2d 914 (App. 1994), and is reproduced at App. 15. The Decision Upon Hearing and Findings and Award of the Industrial Commission of Arizona is unpublished and is reproduced at App. 29.

JURISDICTION

On February 22, 1996, the Arizona Supreme Court vacated its previous order granting review, and denied review of the decision of the Arizona Court of Appeals, thereby upholding the validity of that decision. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV, § 1 to the Constitution of the United States provides:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

Article 18, § 8 of the Constitution of Arizona provides:

> The Legislature shall enact a Workmen's Compensation Law applicable to workmen engaged in manual or mechanical labor in all public employment whether of the State, or any political subdivision or municipality thereof as may be defined by law and in such private employments as the Legislature may prescribe by which compensation shall be required to be paid to any such workman, in case of his injury and to his dependents, as defined by law, in case of his death, by his employer, if in the course of such employment personal injury to or death of any such workman from any accident arising out of and in the course of, such employment, is caused in whole, or in part, or is contributed to, by a necessary risk or danger of such employment, or a necessary risk or danger inherent in the nature thereof, or by failure of such employer, or any of his or its agents or employee or employees to exercise due care, or to comply with any law affecting such employment; provided that it shall be optional with any employee engaged in any such private employment to settle for such compensation, or to

retain the right to sue said employer or any person employed by said employer, acting in the scope of his employment, as provided by this Constitution; and, provided further, in order to assure and make certain a just and humane compensation law in the State of Arizona, for the relief and protection of such workmen, their widows, children or dependents, as defined by law, from the burdensome, expensive and litigious remedies for injuries to or death of such workmen, now existing in the State of Arizona, and producing uncertain and unequal compensation therefore, such employee, engaged in such private employment, may exercise the option to settle for compensation by failing to reject the provisions of such Workmen's Compensation Law prior to the injury, except that if the injury is the result of an act done by the employer or a person employed by the employer knowingly and purposely with the direct object of injuring another, and the act indicates a wilful disregard of the life, limb or bodily safety of employees, then such employee man, after the injury, exercise the option to accept compensation or to retain the right to sue the person who injured him.

A.R.S. § 23-1023(C) provides:

If [an employee] proceeds against such other person, compensation and medical, surgical and hospital benefits shall be paid as provided in this chapter and the insurance carrier or other person liable to pay the claim shall have a lien on the amount actually collectable from such other person to the extent of such compensation and medical, surgical and hospital benefits paid. This lien shall not be subject to

a collection fee. The amount actually collectable shall be the total recovery less the reasonable and necessary expenses, including attorneys' fees, actually expended in securing such recovery. The insurance carrier or person shall contribute only the deficiency between the amount actually collected and the compensation and medical, surgical and hospital benefits provided or estimated by the provisions of this chapter for such case. Compromise of any claim by the employee or his dependents at an amount less than the compensation and medical, surgical and hospital benefits provided for shall be made only with written approval of the compensation fund, or of the person liable to pay the claim.

A.R.S. § 23-1061(J) provides:

The commission shall investigate and review any claim in which it appears to the commission that the claimant has not been granted the benefits to which such claimant is entitled. If the commission determines that payment or denial of compensation is improper in any way, it shall hold a hearing pursuant to section § 23-941 within sixty days after receiving notice of such impropriety.

A.R.S. § 23-907(A)&(B) provides:

"Liability of employer failing to secure compensation; defenses; presumption; right of employee to compensation under chapter; information exchange; civil penalty; settlement of disputed claim:

(A) Employers who are subject to and who fail to comply with the provisions of section 23-961 or 23-962 shall be entitled to the benefits

of this chapter during the period of noncompliance, but shall be liable in an action under any other applicable law of the state. In such action the defendant shall not avail himself of the defenses of assumption of risk or contributory negligence. In all such actions proof of the injury shall constitute prima facie evidence of negligence on the part of the employer and the burden shall be upon the employer to show freedom from negligence resulting in the injury.

(B) An employee of such an employer, or the employee's dependents in case death ensued, may, in lieu of proceeding against the employer by civil action in court, file his application with the commission for compensation in accordance with the provisions of this chapter, and the commission shall hear and determine the application for compensation in the manner other claims are heard and determined before the commission. The compensation so determined shall be paid from the special fund established by section 23-1065 to person entitled thereto after a finding and award for benefits has been issued and becomes final . . . "

STATEMENT OF THE CASE

Petitioner Anthony Macaluso was employed by Derrick Anderson dba Anderson Studios in 1990 as marketing director for a portrait photography studio. On June 19, 1991, after leaving the Indoor Swap Meet in Tucson, Arizona, on a business errand, Petitioner was injured when he collided with the rear of a car driven by Vera Marie Goothe, who had pulled onto the roadway in front

of Petitioner. Petitioner suffered serious injuries, including multiple fractures and a closed head injury.

Petitioner filed a workers' compensation claim with the Industrial Commission of Arizona on October 31, 1991. His employer, Anderson Studios, had not purchased workers' compensation insurance coverage as mandated by Arizona law and the claim was assigned to the Industrial Commission of Arizona Special Fund/No Insurance Section. The Industrial Commission Special Fund issued a Notice of Determination on January 13, 1992, denying Petitioner's claim for workers' compensation benefits. Petitioner protested this Notice of Determination on January 16, 1992.

Petitioner retained an attorney to represent him regarding a third-party action against the driver of the other vehicle. On February 5, 1992, Petitioner, through his then attorney, reached a compromise and settlement of his third party claim without having to file a lawsuit. The settlement was for the third party's liability insurance policy limit of $100,000.00. Petitioner received $63,000.00 from this settlement after satisfying payment of costs and attorney's fees. Petitioner, through previous counsel, did not seek or receive the Industrial Commission Special Fund's approval for this settlement. Petitioner released the third party from further liability from this incident on August 17, 1992.

Formal Hearings were held before the Industrial Commission of Arizona in Tucson on April 24, 1992, June 4, 1992, and August 18, 1992. The Administrative Law Judge ("ALJ") on October 30, 1992, issued her Decision Upon Hearing and Findings and Award, finding both that

Petitioner was an employee and that he was injured within the course and scope of his employment, and that he had sustained a compensable injury. The ALJ awarded Petitioner medical, surgical and/or hospital benefits and temporary total and/or temporary partial disability compensation benefits from June 18, 1991, until such time as Petitioner's condition related to the industrial injury became medically stationary.

The uninsured employer filed an untimely Request for Review on December 28, 1992, which was dismissed by the ALJ on February 22, 1993, for being untimely.

Thereafter, the Industrial Commission Special Fund/No Insurance Section failed to pay any medical or compensation benefits on this claim. Petitioner filed a Request for Relief under A.R.S. § 23-1061(J) on April 28, 1993. The ALJ denied the Request for Relief and in a decision filed on December 29, 1993, held that the Petitioner was entitled to no benefits whatsoever for his Industrial Commission claim because the Petitioner compromised his third party claim without the written approval of the Special Fund/No Insurance Section in violation of A.R.S. § 23-1023(C). Upon review, the ALJ affirmed that decision on March 30, 1993.

The Petitioner appealed to the Arizona Court of Appeals, which affirmed the Industrial Commission's decision in an opinion filed August 30, 1994. The Petitioner petitioned the Arizona Supreme Court for review, which was granted in an order issued on March 22, 1995. The Arizona Supreme Court requested briefing and oral argument, and Amicus Curiae briefs were filed on behalf of the Fraternal Order of Police, Tucson Lodge #1 and the

Arizona Workers' Compensation Claims Association and Arizona Self-Insurers Association. Oral arguments were heard on September 28, 1995. Subsequently, with no explanation, the Arizona Supreme Court issued an order dated February 22, 1996, stating that review was improvidently granted, vacating the order granting review, and denying the Petition for Review.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE ARIZONA COURT OF APPEALS VIOLATES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND AMOUNTS TO AN UNCONSTITUTIONAL TAKING OF PROPERTY

The Fourteenth Amendment states, " . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . . " The Arizona Court of Appeals, and the Arizona Supreme Court by letting the lower court's decision stand, have in essence created a forfeiture of all of the Workers' Compensation benefits to which the Petitioner could appropriately be entitled for his compensable claim.

Forfeitures are disfavored, and should be enforced only when within the letter and spirit of the law. *United States v. One Ford Coach*, 307 U.S. 219 (1939). A bar to recovery is in essence a forfeiture, and the legislature must specifically express its intention to authorize such a penalty. *E & S Insulation Co. v. E.L. Jones Construction*, 121 Ariz. 468, 591 P.2d 560 (App. 1979).

Workers' compensation laws are deemed to be in the public interest, and are to be liberally construed in furtherance of the purpose for which they were enacted and so as to avoid incongruous or harsh results. *Baltimore & P.S.B. Co. v. Norton*, 284 U.S. 408, 52 S.Ct. 187, 76 L.Ed. 366; *Industrial Commission v. McCartin*, 330 U.S. 622, 67 S.Ct. 886, 91 L.Ed. 1140.

The Arizona Workers' Compensation Act is to be construed liberally. The Arizona Supreme Court held in *Marriott Corporation v. Industrial Commission of Arizona*, 147 Ariz. 116, 708 P.2d 1307 (1985):

> Any statutory construction which would exclude an employee from workers' compensation protection will require specific language to that effect. . . . Absent a specific statutory bar to eligibility, the employee's right to opt for workers' compensation benefits is constitutional and other legislation is impotent to deprive him of it.

Further, the Arizona Court of Appeals has itself held, "[T]he ultimate sanction of forfeiture is contrary to [the] remedial purpose" of workers' compensation. *Arizona Department of Public Safety v. Industrial Commission of Arizona*, 170 Ariz. 275, 823 P.2d 1283 (App. 1992).

While A.R.S. § 23-1023(C) does require that an employee obtain carrier approval before settling a third party claim, the statute is silent as to a punishment for failure to comply.

A.R.S. § 23-1023 provides that when a claim has been accepted for benefits, the employer/insurer has a lien on any recovery by the injured employee from a third party

claim arising out of the same injuries. § 23-1023(C) provides that an employee may not compromise or settle such a third party claim for less than the amount of compensation provided for without the written approval of the employer/insurer.

Since A.R.S. § 23-1023 is silent as to the penalty for failing to comply, and contains no statutory authority for the forfeiture of all future benefits. As noted above, a statute must contain specific language in order to bar an injured employee with a compensable claim from receiving any workers' compensation benefits. In any event, no other legislation has the power to deprive an injured employee of his right to compensation, once he is found to have a compensable claim. *Marriott, supra.* Consequently, Petitioner had no notice that by failing to obtain written approval of his settlement with Ms. Goothe, he was forfeiting his right to all future benefits.

" . . . [T]he suspension of benefits is a penalty to be imposed only where there is some wrongful act on the part of the injured workman, which wrongful act *is included within one of the statutory provisions for suspending benefits.*" *Godfrey v. Industrial Commission of Arizona,* 124 Ariz. 153, 602 P.2d 821 (App. 1979) (emphasis added). *Godfrey* involved an Arizona workers' compensation provision allowing the suspension of benefits to a claimant when that claimant leaves the state while receiving compensation without permission from the Industrial Commission. By analogy, if suspension requires explicit statutory language, then the harsher penalty of forfeiture should require it even more so.

"An act must be complete in all its terms when it leaves the legislature; so that those charged with the administration of such act are amenable to the courts for failure to put it into effect or for its maladministration, and so that everyone may know by reading the law what his rights are and how it shall operate when put into execution; and the court cannot supply material and essential omissions." 82 C.J.S. Statutes § 64 (1953). The courts below relied on *Hornback v. Industrial Commission of Arizona*, 106 Ariz. 216, 474 P.2d 807 (1970), for the proposition that Petitioner had forfeited his right to future compensation benefits. However, as noted above, and especially in the area of forfeiture, the courts cannot create essential provisions of a statute. By doing so in this case, the Arizona Supreme Court has unconstitutionally deprived Petitioner of his right to property; to wit, his right to compensation benefits for his compensable on-the-job injury.

In construing a similar provision regarding third party settlements, *§ 33 of the Longshoremen's and Harbor Workers' Compensation Act* (which *does* contain a forfeiture provision), this Honorable Court has held that the purpose of requiring the employer's or carrier's consent was to protect against ill-advised settlements, and that an insurer is only discharged from liability upon a showing of actual prejudice to the insurer's right of subrogation. *Chapman v. Hoage*, 296 U.S. 526 (1935); *see also Weyerhaeuser Timber Co. v. Marshall*, 102 F.2d 78 (9th Cir. 1939). An employer is not entitled to a windfall defense absent such prejudice. *Id.* Indeed, the trend in most jurisdictions has been to avoid the harsh results which would result from strict application of statutes requiring consent

of employers in third party settlements. See *McClanahan v. Morauer & Hartzell, Inc.*, 404 U.S. 16 (1971) (Douglas, J., dissenting). Given the liberal interpretation to be given to workers' compensation statutes, and given that there is no provision for forfeiture in the Arizona statute and thus no notice, Petitioner's right to benefits was unfairly taken away by the Arizona courts' decisions.

Other possible sanctions for failure to obtain approval do exist. For example, in *Matter of Estate of Boettcher*, 665 P.2d 1378 (Wash.App. 1983), the Court of Appeals of Washington held that a third party settlement obtained without written approval by the Department of Labor and Industries, as required by Washington law, was *void*. Again, however, this punishment for failure to obtain written approval was specifically laid out in their statute.

In *Smith v. Trapp*, 58 Cal.Rptr. 229 (App. 1967), the California Court of Appeal took a different approach. The California statue, *Labor Code Section 3859*, provides that no third party settlement or release is valid without the written consent of the employer or insurer. The Smith court held that such an unapproved third party settlement was thus *voidable*, citing to the purpose of the statute as protecting the subrogation rights of the employer or insurer by protecting against the employee accepting too low of an amount in such a settlement. Therefore, such a settlement could either be voided or accepted by the employer or insurer.

The universal purpose of workers' compensation acts is to provide protection for workers, and the assurance that they will not have to bear the financial burden of

injuries suffered while on the job. Absent a specific statutory provision to the contrary, that protection cannot be taken away from the worker.

In this case, the employer was uninsured, in violation of the Arizona workers' compensation statute. Under the Arizona statutory scheme, the Special Fund/No Insurance Division was set up for just this eventuality. The decision below would allow both the employer, who was operating in violation of the law, and the Special Fund/No Insurance Division, which exists for no reason but to protect employees of uninsured employers, such as the Petitioner, to avoid responsibility entirely. It amounts to imposing the financial burden on the employee, in contravention of the spirit and purpose of the workers' compensation statute, the Arizona Constitution, the U.S. Constitution, and various decisions of this Court. By depriving the Petitioner of his property, i.e., his right to compensation, and by imposing a punishment not specified by the governing statute, the decision violates Petitioner's due process rights under the Fourteenth Amendment.

II.

A.R.S. § 23-1023(C) VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE THERE IS NO RATIONAL BASIS FOR IT

A.R.S. § 23-1023(C), as interpreted in the decision below, violates Petitioner's Fourteenth Amendment rights by depriving him of property without due process of law. The statute is arbitrary and irrational: There is no rational basis for a statutory provision which defeats the

larger statutory scheme. The state has a proper interest in protecting the rights of both employees and employers, but a provision which arbitrarily forfeits the rights of the former by a misguided and unnecessary attempt to protect those of the latter is unconstitutional.

Further, the interpretation given to A.R.S. § 23-1023 creates a dichotomy of claimants for Workers' Compensation benefits in the State of Arizona. Those claimants without third party claims are obviously not subject to forfeiture of benefits and those with third party claims are. In the instant case we are dealing with a California attorney who undertook to represent Mr. Macaluso regarding his Arizona injury. Said attorney should certainly be held to have familiarity with the statutory law of Arizona even though lacking familiarity with case law which attempts to fill the gaps of legislation by adding a forfeiture provision by judicial fiat. Quaere, is it fair, equitable, or supportable within the framework of *Article 18, Section 8* of the *Arizona Constitution* or the myriad decisions of the Arizona courts mumbling the spirit and intent of the Act to be construed in favor of the worker, to deprive Petitioner of benefits based upon his attorney's error? Does not the foregoing place a greater burden of knowledge upon the worker unlucky enough to have been injured in a third party liability situation than his brethren without third party involvement?

The Decisions below essentially create a class of compensable claimants for Workers' Compensation benefits who will never receive such due to a failure to properly act by the claimant's attorney. Since we are dealing with social legislation to be liberally construed in favor of the

worker, the interpretations below are arbitrary and irrational and, as such, in violation of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States of America.

III.

A.R.S. § 23-1023(C) IS UNCONSTITUTIONALLY VAGUE

A statute must be definite to be valid; if the language of a statute does not convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices, then it is so vague as to violate the due process clause of the United States Constitution. *Keyishian v. Board of Regents*, 385 U.S. 589. A.R.S. § 23-1023(C) is such a statute, as it provides no notice to the people of Arizona that they would forfeit all workers' compensation benefits by failing to obtain carrier approval of a third party settlement.

Although it has been held that a statute will be upheld against a vagueness challenge if a state court has removed the alleged vagueness by an appropriate construction, *see Minnesota ex rel. Pearson v. Probate Court*, 309 U.S. 270 (1939) this is not such a case. While a court decision may render a potentially vague provision valid, this rule only applies in those situations where a court is construing language already in the statute and not acting arbitrarily. See *Hicklin v. Coney*, 290 U.S. 169 (1933). Although the *Hornback*, supra, decision judicially created a penalty for A.R.S. § 23-1023, it was not an "appropriate construction" of the statute because it was not a construction of the statute at all, but rather an addition to it.

Further, as noted above, forfeiture of workers' compensation rights requires an express *legislative* provision. Thus, A.R.S. § 23-1023(C) is void for vagueness, because it does not convey sufficient warning as to the penalties involved for the proscribed conduct.

If, as stated above, the "[Arizona] Workmen's Compensation Act should be given a liberal construction in keeping with the humanitarian and compassionate motives which caused their adoption . . . ," it is impossible to equate doing so with a forfeiture of benefits not provided for in the statute. *See Ocean Accident & Guaranty Corp. of Arizona v. Industrial Com.*, 32 Ariz. 265, 257 P. 64 (1927), *Pressley v. Industrial Commission*, 73 Ariz. 22, 236 P.2d 1011 (1951), *Sneed v. Belt*, 130 Ariz. 229, 635 P.2d 517 (App. 1981).

Certainly A.R.S. § 23-1023(C) is not only vague with regard to any result of failure to obtain permission for a third-party settlement, but it is absolutely non-existent with regard to a forfeiture of benefits upon non-compliance.

CONCLUSION

The Supreme Court of Arizona accepted review and limited briefing to whether or not *Hornback*, supra, should be set aside. After full briefing on this issue and after an oral argument in which it appeared that the Court was leaning toward ameliorating the *Hornback*, supra, decision to have the proceeds of the third party claim provide a credit against compensation benefits and once the credit was completed, to reinstate full benefits,

the only question that appeared unsettled was whether this could be accomplished without reversing *Hornback*, supra.

The subsequent denial of review as having been improvidently granted, with no further explanation, has left this Petitioner without remedy unless this Honorable Court accepts this Petition. The action taken by the Arizona Supreme Court herein in denying review is as arbitrary and capricious as the interpretation of the statute in *Hornback*, supra. It is now approaching five years since Mr. Macaluso's injury and four years since his claim was held to be compensable. It now remains for this Honorable Court to correct the wrongs inflicted upon him.

It is with the fervent hope that a still small voice may yet be heard that your Petitioner prays that this Honorable Court may come to the aid and assistance of one of its innocent citizens thus far denied the protection intended for him and his fellow citizens.

For the foregoing reasons we respectfully submit that the Court should grant a writ of certiorari to review the decision of the Supreme Court of the State of Arizona.

Respectfully submitted,

BERNARD I. RABINOVITZ
Attorney for Petitioner

SUPREME COURT OF ARIZONA

ANTHONY MACALUSO, Petitioner Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, DERRICK ANDERSON, a single man, dba ANDERSON STUDIOS, Respondent Employer, INDUSTRIAL COMMISSION OF ARIZONA, NO INSURANCE SECTION, Respondent Party in Interest.	Supeme Court No. CV-94-0472-PR Court of Appeals No. 2 CA-IC 94-0017 Industrial Commission No. 91336-027124 **ORDER** (Filed Feb. 22, 1996)

On further consideration and after a review of the record, the Court concluded that review was improvidently granted. Therefore,

IT IS ORDERED that the order granting review is vacated.

IT IS FURTHER ORDERED that the Petition for Review is denied. Dated this 22nd day of February, 1996.

/s/ Stanley G. Feldman
STANLEY G. FELDMAN
Chief Justice

TO:

Bernard I. Rabinovitz, Esq., Rabinovitz & Associates, P.C.

Anita R. Valainis, Chief Counsel, Industrial Commission of Arizona

Michael A. Edson, Esq., Law Offices of Michael A. Edson, P.C.

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SUPREME COURT OF ARIZONA

ANTHONY MACALUSO, Petitioner Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, DERRICK ANDERSON, a single man, dba ANDERSON STUDIOS, Respondent Employer, INDUSTRIAL COMMISSION OF ARIZONA, NO INSURANCE SECTION, Respondent Party in Interest.	Supreme Court No. CV-94-0472-PR Court of Appeals No. 2 CA-IC 94-0017 Industrial Commission No. 91336-027124 **ORDER** (Filed Sep. 22, 1995)

Justice Robert J. Corcoran has recused himself and will therefore not participate in the argument or decision in this matter. Therefore, pursuant to art. 6, § 3 of the Arizona Constitution,

IT IS ORDERED that the Honorable Philip E. Toci, Judge of the Court of Appeals, Division One, is designated to sit on the case and particpate [sic] until the matter is finally determined.

Dated this 22nd day of September, 1995.

/s/ Stanley G. Feldman
STANLEY G. FELDMAN
Chief Justice

TO:
Bernard I. Rabinovitz, Esq., Rabinovitz & Associates, P.C.
Gregory L. Cohen, Esq., Rabinovitz & Associates, P.C.
Michael A. Edson, Esq.
Anita R. Valainis, Chief Counsel, Industrial Commission of Arizona
Ronald M. Anderson, Industrial Commission of Arizona
Brian I. Clymer, Esq., Tretschok, McNamara & Clymer
Hon. Philip E. Toci, Vice Chief Judge, Court of Appeals, Division One – Phoenix

/cjt

SUPREME COURT OF ARIZONA

ANTHONY MACALUSO, Petitioner Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, DERRICK ANDERSON, a single man, dba ANDERSON STUDIOS, Respondent Employer, INDUSTRIAL COMMISSION OF ARIZONA, NO INSURANCE SECTION, Respondent Party in Interest.	Supreme Court No. CV-94-0472-PR Court of Appeals No. 2 CA-IC 94-0017 Industrial Commission No. 91336-027124 **AMENDED ORDER** (Filed Sep. 20, 1996)

On consideration of the motion filed by the Arizona Workers Compensation Claims Association and Arizona Self-Insurers Association to file a brief as amici curiae and participate in oral argument and the opposition thereto filed by Petitioner Employee,

IT IS ORDERED that the Motion to File Amicus Curiae Brief is granted. The Clerk of Court shall file the brief. Petitioner Employee may file a response, limited to twenty (20) pages, within twenty-one (21) days of the date of this order.

IT IS FURTHER ORDERED that the Motion to Participate in oral Argument is denied.

Dated this 20th day of September, 1995.

/s/ Stanley G. Feldman
STANLEY G. FELDMAN
Chief Justice

TO:

Bernard I. Rabinovitz, Esq., Rabinovitz & Associates, P.C.
Anita R. Valainis, Chief Counsel, Industrial Commission of Arizona
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Ronald M. Andersen, Esq., Industrial Commission of Arizona
Brian I. Clymer, Esq., Tretschok, McNamara & Clymer
R. Todd Lundmark, Esq., Long, Lundmark & Poppe, P.A.

SUPREME COURT OF ARIZONA

ANTHONY MACALUSO, Petitioner Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, DERRICK ANDERSON, a single man, dba ANDERSON STUDIOS, Respondent Employer, INDUSTRIAL COMMISSION OF ARIZONA, NO INSURANCE SECTION, Respondent Party in Interest.	Supeme Court No. CV-94-0472-PR Court of Appeals No. 2 CA-IC 94-0017 Industrial Commission No. 91336-027124 **ORDER** (Filed Sep. 20, 1995)

On consideration of the motion filed by the Arizona Workers Compensation Claims Association and Arizona Self-Insurers Association to file a brief as amici curiae and participate in oral argument and the opposition thereto filed by Petitioner Employee,

IT IS ORDERED that the Motion to File Amicus Curiae Brief and to Participate in Oral Argument is granted. The Clerk of Court shall file the brief. Petitioner Employee may file a response, limited to twenty (20)

pages, within twenty-one (21) days of the date of this order.

IT IS FURTHER ORDERED that amici may participate in oral argument, sharing the time allotted to Respondents in whatever proportion is agreed to by counsel. No additional time of argument will be allowed.

Dated this 20th day of September, 1995.

/s/ Stanley G. Feldman
STANLEY G. FELDMAN
Chief Justice

TO:

Bernard I. Rabinovitz, Esq., Rabinovitz & Associates, P.C.
Anita R. Valainis, Chief Counsel, Industrial Commission of Arizona
Michael A. Edson, Esq., Law Offices of Michael A. Edson, P.C.
Ronald M. Andersen, Esq., Industrial Commission of Arizona
Brian I. Clymer, Esq., Tretschok, McNamara & Clymer
R. Todd Lundmark, Esq., Long, Lundmark & Poppe, P.A.

[SEAL]

SUPREME COURT

STATE OF ARIZONA

402 Arizona State Courts Building
1501 West Washington
Phoenix, Arizona 85007-3329

Telephone: (602) 542-9396

Noël K. Dessaint
Clerk of Court

Kathleen E. Kempley
Chief Deputy Clerk

July 27, 1995

NOTICE OF ORAL ARGUMENT

RE: **ANTHONY MACALUSO vs. INDUSTRIAL COMMISSION OF ARIZONA/DERRICK ANDERSON dba ANDERSON STUDIOS ET AL**
Supreme Court No. CV-94-0472-PR
Court of Appeals No. 2 CA-IC-94-0017
Industrial Commission No. 91336-027124

GREETINGS:

The above-entitled cause has been set for Oral Argument before the Supreme Court of the State of Arizona on **Thursday, September 28, 1995, at 9:30 A.M.,** in its Courtroom, Phoenix, Arizona.

Oral Arguments will be limited to **twenty (20) minutes per side.** Counsel for the parties should appear in the Clerk's Office to sign in at least thirty (30) minutes prior to the time set for arguments.

Supplemental citations of legal authority filed less than five days before oral argument unless good cause is shown for a later filing.

A signed acknowledgement of the receipt on the enclosed copy must be returned to the Clerk's Office within 5 days with the name of the lawyer who will argue the case.

ARIZONA SUPREME COURT
APPELLATE ADVOCACY INSTRUCTIONS
FOR ORAL ARGUMENTS

1. If there is any change in positions or status of the case, the court is to be informed *immediately.*

2. If the lawyer arguing fails to sign in at the clerk's office at least thirty minutes before the time scheduled for argument, the case may be moved, vacated, or argument commenced without the lawyer being present, whichever the court deems best under the circumstances.

3. If the lawyer intends to refer to exhibits during argument, he or she must deliver six copies to the clerk at the time of sign-in, plus one copy to each opponent.

4. If a chart, graph, or exhibit is to be used on an easel during argument, the clerk must be notified at sign-in or before so that proper arrangements can be made before argument commences. If such a chart, graph, or exhibit is used, it is helpful to the court if photos or other replicas are given to the clerk at the time of sign-in.

5. There is an attorneys' lounge located near the Supreme Court courtroom for use by all attorneys arguing before the Court. Please check with the

clerk's office and a deputy clerk will direct you to Room 424.

6. A dress code is enforced. Lawyers, male and female, are required to dress appropriately for court appearances.

7. Each lawyer should identify himself or herself at the time he or she commences argument.

8. The microphone at the podium is for the purpose of recording and separate sound amplification.

9. The time remaining for each lawyer's argument is kept by the clerk. Each lawyer must keep himself or herself aware of the time. If the lawyer with opening argument wishes to save time for rebuttal, he or she will be responsible to conclude opening argument before the allotted time has been used. The lawyers should bear in mind that time spent answering questions is charged against the allotted time for argument.

10. No one is allowed at the counsel table in front of the bar except those who have been admitted to the bar and who are connected in some way with the case being argued. This includes, of course, members of the firms of those arguing or those who have appeared on the brief. Non-lawyers are not permitted at the counsel table or in front of the bar. Lawyers who are not connected with the case are also not permitted.

11. If a lawyer has any questions about procedure, protocol, or the like, these may be addressed to the clerk before argument commences.

NOEL K. DESSAINT, Clerk
By /s/ Linda Smith
Deputy Clerk

TO:
Bernard I. Rabinovitz, Esq. and Gregory L. Cohen, Esq., Rabinovitz & Associates, P.C.
Anita R. Valainis, Chief Counsel, Industrial Commission of Arizona
Michael A. Edson, Esq., Law Offices of Michael A. Edson, P.C.
Ronald M. Andersen, Esq., Industrial Commission of Arizona
Brian I. Clymer, Esq., Tretschok, McNamara & Clymer

THE UNDERSIGNED ACKNOWLEDGES RECEIPT OF THE NOTICE OF ORAL ARGUMENT AND THE ENCLOSED INSTRUCTIONS FOR ORAL ARGUMENT THIS _____ DAY OF _____, 1995.

_____

SIGNATURE

NAME OF ATTORNEY WHO WILL ARGUE THE CASE:

_____

_____

SUPREME COURT OF ARIZONA

ANTHONY MACALUSO, Petitioner Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, DERRICK ANDERSON, a single man, dba ANDERSON STUDIOS, Respondent Employer, INDUSTRIAL COMMISSION OF ARIZONA, NO INSURANCE SECTION, Respondent Party in Interest.	) Supreme Court) No. CV-94-0472-PR)) Court of Appeals) No. 2 CA-IC-94-0017)) Industrial) Commission) No. 91336-027124)))) **ORDER**))) (Filed Apr. 22, 1995)

The Petition for Review came before the Court on March 21, 1995. On consideration.

IT IS ORDERED that the Petition for Review is granted on all issues.

IT IS FURTHER ORDERED that counsel shall file simultaneous briefs addressing the following issues:

1. Should *Hornback v. Industrial Commission,* 106 Ariz. 216, 474 P.2d 807 (1970), be overruled or modified so as to preclude forfeiture of benefits absent a showing of prejudice to the Commission resulting from the claimant's failure to obtain Commission approval of a settlement?

2. What evidence of such prejudice exists in this case?

Briefs are limited to twenty-five (25) pages and shall be filed within thirty (30) days from the date of this order.

IT IS FURTHER ORDERED that the case will be set for oral argument.

Dated this 22nd day of March, 1995.

/s/ Stanley G. Feldman
STANLEY G. FELDMAN
Chief Justice

The Clerk of the Court of Appeals, Division Two, Tucson, shall forward the remaining record to the Clerk of the Supreme Court.

Counsel shall be advised of the date and time of oral argument at such time as the hearing date and time is determined.

TO:

Bernard I. Rabinovitz, Esq. and Gregory L. Cohen, Esq., Rabinovitz & Associates, P.C.
Anita R. Valainis, Chief Counsel, Industrial Commission of Arizona
Michael A. Edson, Esq., Law Offices of Michael A. Edson, P.C.
Ronald M. Andersen, Esq., Industrial Commission of Arizona, No Insurance Section
Brian I. Clymer, Esq., Tretschok, McNamara & Clymer
Nancy J. Tyson, ALJ
Joyce A. Goldsmith, Clerk, Court of Appeals, Division Two

js

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ANTHONY MACALUSO, Petitioner Employee, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, DERRICK ANDERSON, a single man, dba ANDERSON STUDIOS, Respondent Employer, INDUSTRIAL COMMISSION OF ARIZONA, NO INSURANCE SECTION, Respondent Party in Interest.	2 CA-IC 94-0017 DEPARTMENT B OPINION (Filed Aug. 30, 1994)

Special Action – Industrial Commission

ICA Claim No. 91336-027124

Administrative Law Judge Nancy J. Tyson

AWARD AFFIRMED

Rabinovitz & Associates, P.C.
by Bernard I. Rabinovitz and Gregory L. Cohen
Tucson

Attorneys for Petitioner Employee

Anita R. Valainis, Chief Counsel
Industrial Commission of Arizona
Phoenix
Attorney for Respondent

Industrial Commission of Arizona
No Insurance Section
by Ronald M. Anderson
Phoenix
Attorneys for Respondent Employer and
Respondent Party in Interest

ESPINOSA, Presiding Judge.

This case presents the question of whether a worker who has requested but not yet received workers' compensation benefits may settle a third-party claim without the approval of the Industrial Commission.

The facts are undisputed. On June 18, 1991, Anthony Macaluso was injured in an automobile accident while in the course of his employment with Anderson Studios. Because Anderson Studios was not covered by workers' compensation insurance, Macaluso's October 1991 claim for compensation was assigned to the Industrial Commission's No Insurance Section. The Industrial Commission denied his claim on January 13, 1992, and three days later Macaluso filed a request for hearing. On February 5, 1992, before filing a third-party action against the driver of the other vehicle involved in the accident and without seeking the approval of the Industrial Commission, Macaluso settled with the driver's insurer for its policy limits of $100,000.

Hearings were held on Macaluso's workers' compensation claim in April, June, and August, 1992. On October 30, 1992, the administrative law judge (ALJ) issued an award finding the claim compensable. Six months later, after Macaluso had still not received any medical or compensation benefits, he filed an A.R.S. § 23-1061(J) request for relief. On December 29, 1993, the ALJ issued a second award, this time finding that because Macaluso had compromised his claim without having received written approval as required by § 23-1023(C), he was barred from receiving workers' compensation benefits. The award was affirmed upon review and Macaluso requested special action review by this court. We affirm.

Section 23-1023(C) gives a carrier a lien on a claimant's third-party recovery to the extent of all compensation and medical benefits paid. It further provides:

> Compromise of any claim by the employee or his dependents at an amount less than the compensation and medical, surgical and hospital benefits provided for shall be made only with written approval of the compensation fund, or of the person liable to pay the claim.

See also Ariz. Admin. Code R4-13-120. In *Hornback v. Industrial Commission*, 106 Ariz. 216, 474 P.2d 807 (1970). our supreme court interpreted the phrase "at an amount less than the . . . benefits provided for" to mean at an amount less than the amount the claimant could recover as workers' compensation benefits. Thus, although Macaluso had received no benefits at all and could not settle for less than the benefits provided, he was nevertheless required to obtain approval of the settlement. The court in *Hornback* also held that failure to obtain approval of a

settlement results in any further workers' compensation being barred. Thus, because Macaluso settled his claim without approval, he is now barred from receiving any workers' compensation benefits.

Macaluso seeks to avoid this result by arguing that, unlike the facts in *Hornback*, which involved a petition to reopen, his claim had not been accepted at the time he settled his third-party claim, and he never received any workers' compensation benefits. Therefore, he argues, the No Insurance Section has no subrogation rights under § 23-1023(C) and thus no right to approve the settlement. This argument overlooks the fact that once Macaluso filed a claim for workers' compensation benefits, that claim came under the jurisdiction of the Industrial Commission and he was bound by the provisions of the Workers' Compensation Act as well as the Rules of Procedure for Hearings Before the Industrial Commission. See *Inspiration Consolidated Copper Company v. Smith*, 78 Ariz. 355, 280 P.2d 273 (1955); Ariz. Admin. Code R4-13-157.

Because Macaluso violated the provisions of § 23-1023(C), we are bound by the decision in *Hornback* to affirm the award of December 29, 1993, by which he is barred from receiving workers' compensation benefits. His invitation to overturn the ruling in *Hornback* is best addressed to the supreme court.

Finally, as to the issue of the extent of the No Insurance Section's lien, we agree with Macaluso that because § 23-1023(C) provides that the lien is on the amount "of such compensation and medical, surgical and hospital benefits paid" and because no benefits have been paid,

any lien it has is on nothing. *See EBI Companies v. Industrial Commission*, ___ Ariz. ___, 875 P.2d 857 (App. 1994).

Award affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA,
Presiding Judge

CONCURRING:

/s/ William E. Druke
WILLIAM E. DRUKE, Chief Judge

/s/ James D. Hathaway
JAMES D. HATHAWAY,
Judge

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ANTHONY MACALUSO, Petitioner, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, DERRICK ANDERSON, a single man, dba, ANDERSON STUDIOS, Respondent Employer, SPECIAL FUND DIVISION/NO INSURANCE SECTION, Respondent Party in Interest.	1 CA-IC 94-0066 ICA CLAIM NO. 91336-027124 336-48-7905 CARRIER NO. UNKNOWN **ORDER** (Filed May 9, 1994)

Pursuant to the provisions of A.R.S. § 12-120 (E), arrangements have been made between the Chief Judge of Division I and the Chief Judge of Division II for the transfer of the following designated review to Division II in order that the Judges of Division II may participate in and decide the matters.

In accordance with the foregoing,

IT IS ORDERED that 1 CA-IC 94-0066 is transferred to Division II for all further proceedings involved in the consideration and disposition of said matter.

IT IS FURTHER ORDERED that counsel shall file any further documentation relating to this matter with the Clerk of the Court of Appeals, Division II.

DATED May 9, 1994.

/s/ Ruth V. McGregor
RUTH V. McGREGOR,
VICE CHIEF JUDGE,
DIVISION I

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

ANTHONY MACALUSO, Petitioner, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, DERRICK ANDERSON, a single man, dba, ANDERSON STUDIOS, Respondent Employer, SPECIAL FUND DIVISION/NO INSURANCE SECTION, Respondent Party in Interest.	1 CA-IC 94-0066 ICA CLAIM NO. 91336-027124 336-48-7905 CARRIER NO. UNKNOWN CERTIFICATE OF MAILING (Filed May 9, 1994)

PETITION FOR SPECIAL
ACTION-INDUSTRIAL COMMISSION
WRIT OF REVIEW

A copy of each of the above-specified documents were mailed May 9, 1994, to:

Mr. Bernard I. Rabinovitz,
RABINOVITZ & ASSOCIATES, P.C.
P.O. Box 41600
Tucson, AZ 85717
Attorneys for Petitioner

Ms. Anita R. Valainis, Chief Counsel
THE INDUSTRIAL COMMISSION OF ARIZONA
Suite 400
800 West Washington
Phoenix, AZ 85007-2934
Attorneys for Respondent

IN THE

COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

ANTHONY MACALUSO, Petitioner, v. THE INDUSTRIAL COMMISSION OF ARIZONA, Respondent, DERRICK ANDERSON, a single man, dba, ANDERSON STUDIOS, Respondent Employer, SPECIAL FUND DIVISION/NO INSURANCE SECTION, Respondent Party in Interest.	1 CA-IC 94-0066 ICA CLAIM NO. 91336-027124 336-48-7905 CARRIER NO. UNKNOWN WRIT OF REVIEW (Filed May 9, 1994)

TO: THE INDUSTRIAL COMMISSION OF ARIZONA

YOU ARE HEREBY DIRECTED to Certify to the Court of Appeals, Division I within ten (10) days from the date hereof all records, proceedings and evidence in the above entitled and numbered cause, to the end that the decision of The Industrial Commission of Arizona in Claim No. 91336-027124 may be reviewed by the Court of Appeals, Division I.

DATED: May 9, 1994.

GLEN D. CLARK, CLERK
By

/s/ Linda Lowell
Deputy Clerk

[SEAL]

BEFORE THE INDUSTRIAL
COMMISSION OF ARIZONA

ANTHONY MACALUSO Applicant, vs. DERRICK ANDERSON, A SINGLE MAN dba ANDERSON STUDIOS Defendant Employer, SPECIAL FUND DIVISION/ NO INSURANCE SECTION Defendant Party In Interest.	)	ICA CLAIM NO. 91336-027124 SOCIAL SECURITY NO. 336-48-7905 CARRIER CLAIM NO. UNKNOWN DATE OF INJURY: 06/18/91 **DECISION UPON REVIEW AFFIRMING DECISION UPON HEARING AND FINDINGS AND AWARD DENYING A.R.S. §23-1061(J) RELIEF**

On December 29, 1993, a DECISION UPON HEARING AND FINDINGS AND AWARD DENYING A.R.S. §23-1061(J) RELIEF was issued by this Administrative Law Judge. On January 28, 1994, the applicant filed a REQUEST FOR REVIEW. On February 14, 1994, the applicant filed a REQUEST FOR REVIEW. On February 14, 1994, the defendants filed a RESPONSE to the REQUEST FOR REVIEW.

This Administrative Law Judge, having fully reconsidered the file, records and all matters hereunto appertaining, now enters her DECISION UPON REVIEW AFFIRMING the DECISION.

FINDINGS

1. The DECISION UPON HEARING AND FINDINGS AND AWARD issued on December 29, 1993 is fully supported by the law and evidence of record and is hereby affirmed.

AWARD

IT IS HEREBY ORDERED that the DECISION UPON HEARING AND FINDINGS AND AWARD DENYING A.R.S. §23-1061(J) RELIEF issued on December 29, 1993 be, and the same hereby is affirmed.

NOTICE: Any party dissatisfied with this Decision Upon Review may apply to the Court of Appeals of the State of Arizona, Division One, for a review of the lawfulness of this Decision pursuant to the provisions of *Arizona Revised Statutes* Secs. 23-951 A and 12-120.21 B. See also *Rule* 10, *Rules of Procedure for Special Actions, Arizona Revised Statutes.* 17 A. Unless such application is made within THIRTY (30) DAYS after the mailing hereof, this

Decision shall be final. *Arizona Revised Statutes* Sec. 23-943 H.

By /s/ Nancy J. Tyson
NANCY J. TYSON
Administrative Law
Judge

NJT:tmg

DATED AND MAILED IN TUCSON, ARIZONA THIS 30TH DAY OF MARCH 1994.

BEFORE THE INDUSTRIAL
COMMISSION OF ARIZONA

ANTHONY MACALUSO Applicant, vs. DERRICK ANDERSON, A SINGLE MAN dba ANDERSON STUDIOS Defendant Employer, SPECIAL FUND DIVISION/ NO INSURANCE SECTION Defendant Party In Interest.	ICA CLAIM NO. 91336-027124 SOCIAL SECURITY NO. 336-48-7905 CARRIER CLAIM NO. UNKNOWN DATE OF INJURY: 06/18/91 **DECISION UPON HEARING AND FINDINGS AND AWARD DENYING A.R.S. §23-1061(J) RELIEF**

On October 31, 1991, the applicant filed a claim for workers' compensation benefits for an industrial injury sustained while employed by the above-named defendant employer on June 18, 1991.

Following formal hearings in Tucson, Arizona on April 24, June 4 and August 18, 1992, the claim was found compensable by DECISION UPON HEARING AND FINDINGS AND AWARD FOR COMPENSABLE CLAIM issued by the undersigned on October 30, 1992.

On December 30, 1992 the Special Fund of the Industrial Commission issued a NOTICE OF DETERMINATION stating the Special Fund has a lien against any third party benefits paid on the claim.

On April 28, 1993 the applicant filed a REQUEST FOR A.R.S. §23-1061(J) investigation and relief for compensation and medical benefits pursuant to the Award for compensable claim. The matter was referred to hearing on May 25, 1993.

Pursuant thereto, formal hearing was held in Tucson, Arizona on September 17, 1993. Before and after the hearing, counsel filed memoranda.

The applicant is represented by attorney Kathleen M. Walsh. The uninsured employer Derek Anderson is unrepresented by counsel. The Special Fund Division/No Insurance Section defendant party in interest is represented by Michael A. Mosesso.

The undersigned having fully considered the file, records and all matters hereunto appertaining, now enters FINDINGS AND AWARD as follows:

FINDINGS

1. On June 18, 1991, the applicant sustained industrial injuries while employed by the above-named defendant employer, who at all times material hereto was uninsured under the provisions of the Arizona Workers' Compensation Act against liability for the payment of medical, surgical, hospital and/or compensation benefits by the defendant insurance carrier.

2. Prior to the issuance of the Award for compensable claim, the applicant filed a third party claim against a party or parties involved in the motor vehicle accident in which the applicant was injured on June 18, 1991. As noted above, the Award for compensable claim was issued on October 30, 1992. Following a REQUEST FOR REVIEW by the employer, a DECISION UPON REVIEW was issued February 22, 1993 affirming the Award for compensable claim. In the meantime, on February 5, 1992 the applicant executed a release and settlement of claim for $100,000.00, which was the maximum limit of the third parties' insurance policy. On February 10, 1992 the applicant was issued a check for $63,000.00, which was the balance after deduction of attorney's fees and medical expenses. On August 17, 1992 the applicant executed a mutual release and settlement of claims.

3. The applicant argues that the lien should not attach at all but if it does it should not attach until February 22, 1992, pointing out that the lien statute is vague and should be strictly construed especially in a case like this where the third party settlement was executed during a period when the compensability was in dispute and prior to the award of compensability. The applicant also argues the purpose of the statute is satisfied, which is to prevent a settlement which is too small. The defendants, on the other hand, argue the lien should attach and should attach as of the date of injury because the applicant failed to obtain written approval from the carrier prior to settling the third party claim. The defendants primarily rely upon the cases of *Hornback v. Industrial Commission*, 106 Ariz. 216, 474 P.2d 807 (1970) and *Grinnell v. Industrial Commission*, 139 Ariz. 124, 677 P.2d

287 (1984). In *Hornback*, the Arizona Supreme Court held the applicant's PETITION TO REOPEN should be denied because he settled the third party claim prior to obtaining written approval from the carrier as required by statute. The court went on to say that approval was required even if the settlement was in excess of the workers' compensation benefits to which he was entitled at the time of settlement. The major purposes of the lien statute is to prevent the employee from accepting too small a settlement and prejudicing the subrogation rights of the carrier. In the instant case, the applicant testified that the third party has other assets in addition to an insurance policy. Therefore, there is evidence of prejudice to the defendants' subrogation rights in the record.

4. If a worker is injured by the negligence or wrong of another not in the same employ, the employee may pursue his remedy against the other person, but such claim maybe [sic] compromised "only with written approval of the compensation fund, or of the person liable to pay the claim." A.R.S.§1023(C). In the instant case, the applicant did not obtain the requisite written approval of the Special Fund before settling his third party claim. As a result, the Special Fund was prejudiced. Although there is no indication the applicant's current workers' compensation benefits exceed the $100,000.00 settlement, the carrier is entitled to protect its subrogation rights to *all* rights of the employee, including future reopening benefits. *See Grinnell v. Industrial Commission*, above. Therefore, since the applicant compromised his claim without written approval required by A.R.S. §23-1023(C) and since the carrier was prejudiced, the applicant is barred from receiving additional workers'

compensation benefits effective June 18, 1991, as of the date of injury.

AWARD

IT IS HEREBY ORDERED that the applicant's REQUEST FOR A.R.S. §23-1061(J) RELIEF is denied. He is barred from receiving workers' compensation benefits effective June 18, 1991.

NOTICE: Any party dissatisfied with this Award may file a written request for review of the same with the Administrative Law Judge Division of The Industrial Commission within THIRTY (30) days after the mailing of this Award as provided by *Arizona Revised Statutes*, Secs. 23-942 D and 23-943 A and B. Unless such written request is made within the time provided, this Award is final.

By /s/ Nancy J. Tyson
NANCY J. TYSON
ADMINISTRATIVE LAW
JUDGE

NJT/tmg

DATED AND MAILED IN TUCSON, ARIZONA, ON THIS 29TH DAY OF DECEMBER, 1993.

INDUSTRIAL COMMISSION OF ARIZONA
Special Fund – No Insurance

Claimant
ANTHONY F. MACALUSO

Claim No.
91336-027124

Date of Injury
06/18/91

Non-Insured Employer
DERRICK ANDERSON, a single man, dba ANDERSON STUDIOS

NOTICE OF DETERMINATION PURSUANT TO A.R.S 23-907(B)

NO INS.

1. [ ] Claim against non-insured employer is ACCEPTED. (122)

2. [ ] Claim against non-insured employer is DENIED. (121)

3. [ ] Compensation is not payable because no time was lost from work in excess of seven (7) days due to this injury. (124)

4. Compensation will be payable based on the following.

   [X] A. Average monthly wage at time of injury established at $1,800.00. (See attached) (118)

   [X] B. Compensation being paid on a lessor wage pending finality of Average Monthly Wage. (151)

5. [ ] Temporary compensation changed to 66-2/3% of the difference between average monthly wage before injury and the wage claimant is able to earn

after date of release for work, effective _____. (177)

6. [ ] Temporary compensation and active medical treatment terminated on _____ because claimant was discharged. (174)

7. [ ] Injury resulted in no permanent disability. (175)

8. [ ] Injury resulted in permanent disability. (Amount of permanent benefits, if any, and supportive medical maintenance benefits, if any, will be authorized by subsequent determination.) (154)

9. [ ] Petition to Reopen accepted effective _____. (147)

10. [ ] Petition to Reopen denied. (148)

11. [X] Other ICA Special Fund has a lien against any 3rd party benefits paid on this claim.

MAILED:
December 30, 1992

SIGNED:
Terrie L. Plew
SPECIAL FUND
MONITOR

NOTICE TO CLAIMANT: If you do not agree with this DETERMINATION and wish a hearing on the matter, your written Request for Hearing must be received at either office of the Industrial Commission listed below within NINETY (90) DAYS after the date of mailing of this DETERMINATION pursuant to ARS Section 23-941

and 23-947. IF NO SUCH REQUEST IS RECEIVED WITHIN THAT NINETY (90) DAY PERIOD THIS DETERMINATION IS FINAL.

NOTICE TO NON-INSURED EMPLOYER: If you do not agree with this DETERMINATION and wish a hearing on the matter, your written Request for Hearing must be received at either office of the Industrial Commission listed below within THIRTY (30) DAYS after the date of mailing of this DETERMINATION pursuant to ARS Section 23-941 and 23-947. IF NO SUCH REQUEST IS RECEIVED WITHIN THAT THIRTY (30) DAY PERIOD, THIS DETERMINATION IS FINAL. The defendant employer is liable to the Special Fund for all benefits payable on claim.

Phoenix Office:
Industrial Commission
of Arizona
800 West Washington
Phoenix, Arizona 85007

P. O. Box 19070
Phoenix, Arizona 85005
Phone: 542-3294

Tucson Office:
Industrial Commission
of Arizona
2675 East Broadway
Tucson, Arizona
85716-5342

INDUSTRIAL COMMISSION OF ARIZONA
AVERAGE MONTHLY WAGE CALCULATION

Date Mailed 12-30-92
Soc. Sec. No. 336-48-7905
Date Injured 6-18-91
Carrier Claim No. 91336-027124
Employer Anderson Studios

1. CLAIMANT Anthony Macalvso
2. DEPENDENTS? YES [ ] NO [X]
3. POLICY No. _____
4. OCCUPATION Director
5. DATE OF HIRE 4/90
6. EMPLOYMENT STATUS: STEADY [X] INTERMITTENT [ ] PART-TIME [ ] MONTHS PER YR. ____
7. BASE RATE OF PAY $ 500.00 PER HOUR [ ] DAY [ ] WEEK [X] MONTH [ ] PIECE RATE [ ]

   PER ABOVE: $ 500.00 X 4.333 = $ 2166.50 AVG
   (max allowable – $1800,00)
8. ACTUAL EARNINGS 30 DAYS BEFORE INJURY. . . . = $ _____
9. EARNINGS WITH INSURED EMPLOYER FROM _____ thru _____ AMOUNT $ _____ ÷ ____ (Days) = $ _____ X 30.416* = $ _____ AVG.
10. EARNINGS SINCE INCREASE WITH INSURED EMPLOYER FROM _____ thru _____ AMOUNT $ _____ ÷ ____ (Days) = $ _____ X 30.416* = $ _____ AVG.
11. WAGE PATTERN OF OTHER EMPLOYEES OF INSURED EMPLOYER:

    _____ FROM _____ thru ____ $ _____ Amt.

    _____ FROM _____ thru ____ $ _____ Amt.

    _____ FROM _____ thru ____ $ _____ Amt.

    TOTAL OF ABOVE $ _____ ÷ ____ (Days) = $ _____ X 30.416* = $ _____ AVG.

12. CLAIMANT'S EARNINGS, OTHER EMPLOYERS:

_____ FROM _____ thru ___ $ _____ Amt.

_____ FROM _____ thru ___ $ _____ Amt.

_____ FROM _____ thru ___ $ _____ Amt.

_____ FROM _____ thru ___ $ _____ Amt.

TOTAL OF ABOVE $ _____ ÷ ___ (Days) = $ _____
X 30.416* = $ _____ AVG.

13. COMBINED EARNINGS FROM ITEMS _____

TOTAL OF ABOVE $ _____ ÷ ___ (Days) = $ _____
X 30.416* = $ _____ AVG.

14. OTHER MONTHLY REMUNERATION FROM INSURED EMPLOYER:

BOARD & LODGING $ _____ ___ OTHER $ _____ = $ _____

15. AVERAGE MONTHLY WAGE ESTABLISHED ON BASIS OF ITEMS 7, + _, + _ $ 1800.00

AMW $1,800.00 X .021918 = $39.45 daily.

* NOTE: (1 year = 365 days; 365 days ÷ 12 months = 30.416 days per average month)

BEFORE THE INDUSTRIAL
COMMISSION OF ARIZONA

ANTHONY MACALUSO Applicant, vs. DERRICK ANDERSON, A SINGLE MAN Defendant Employer, SPECIAL FUND DIVISION/ NO INSURANCE SECTION Defendant Party In Interest.	ICA CLAIM NO. 91336-027124 SOCIAL SECURITY NO. 336-48-7905 CARRIER CLAIM NO. NONE DATE OF INJURY: 06/18/91 **DECISION UPON HEARING AND FINDINGS AND AWARD FOR COMPENSABLE CLAIM**

On October 31, 1991, the applicant filed a claim for worker's compensation benefits alleging he sustained an industrial injury while employed by the above-named defendant employer on June 18, 1991.

On January 13, 1992 the Industrial Commission issued its NOTICE OF DETERMINATION denying the claim.

On January 16, 1992, the applicant filed a REQUEST FOR HEARING and pursuant thereto formal hearings were held in Tucson, Arizona on April 24, June 4, and August 18, 1992.

The applicant is represented by attorney Lawrence J. Sandell. The employer is unrepresented by counsel. The

defendant party in interest is represented by attorney Maria Morlacci.

The undersigned having considered the filed, records, and all matters hereunto appertaining, now enters FINDINGS AND AWARD as follows:

FINDINGS

1. One of the issues in this case is whether the applicant was employed by the above named defendant employer on June 18, 1991. On that day the employer was not insured under the provisions of the Arizona Workers' Compensation Act against liability for medical, surgical, hospital and/or compensation benefits.

2. The applicant begin [sic] his association in 1990 as marketing director for the portraiture business of Derrick Anderson, the named employer herein. They agreed to a salary plus commission which was to start after, according to the applicant, a 60 day period of voluntary services when the applicant was learning the business. The applicant claims Mr. Anderson accepted responsibility for all taxes as well as workers' compensation. There were no set hours, but he worked at least 40 hours each week. His office was in the same location as Mr. Andersons [sic]. All supplies, with the exception of a desk and computer were provided by Mr. Anderson. According to the applicant, Mr. Anderson supervised details of the work such as format of letters, how to handle telephone calls and how to dress. The applicant testified that he and Mr. Anderson met almost daily to discuss business. The applicant denies having or spending any time on other businesses, with the exception of

approximately 40 hours to wind down his former import business. Over a period of time the applicant loaned between $12,000 and $15,000.00 to Mr. Anderson. The applicant denies ever threatening not to be involved in the business if the loan were not repayed [sic]. The applicant insists that on June 18, 1991, he was conducting business for his employer. On that day the applicant had gone to the indoor swap meet in an effort to obtain lease space for a food product (chili) developed by Mr. Anderson. Prior to that date, there had been some discussion among Mr. Anderson, the applicant and another party about retailing the chili. During his return from the swap meet, the applicant stopped off to see his wife, then on his way back to the office was involved in the motor vehicle accident in which he sustained multiple injuries.

3. Derrick Anderson, the owner of the photography and portraiture businesses, testified that 89% of the time the applicant had the freedom to do his work without Mr. Anderson's supervision but had Mr. Anderson not owed the applicant money, he would have imposed a schedule upon the applicant. In Mr. Anderson's opinion, the applicant terminated his affiliation with the company in November 1990 and also in the first week of June 1991. However, Mr. Anderson acknowledge that up until the day of the accident, the applicant continued doing some work for him, although it was "very litte [sic]." Mr. Anderson asserts the applicant was not on company business when he was at the swap meet inasmuch as the applicant had already severed his ties with the chili venture. Mr. Anderson acknowledged the applicant had brought some equipment from Texas to Tucson for the

chili venture, but says the applicant demanded partnership and when that was refused stated he would not be involved in anything in which he did not have 50% ownership. Upon cross-examination Mr. Anderson acknowledged that as owner of the portraiture business he had the right to direct the applicant's work. He testified that he never terminated the applicant's employment nor directed him to leave the premises even though he did not approve of all the applicant's activity because he felt some obligation to the applicant for the money loaned him.

4. Mark Dean Levy owns and manages a male dance group in California, which the applicant brought to Tucson in November 1990. The name of Mr. Anderson's business was used in the promotional material because it was well-known in town, but the applicant was in charge of everything relating to the promotion. He heard Mr. Anderson deny any involvement in the project, but he also overheard Mr. Anderson and the applicant having conversations about details of the promotion. Mr. Dean [Levy] was also involved in preliminary discussions about marketing the chili. He felt there really was no activity regarding that product because no one had put any money into the company.

5. Brian Weeks, general manager of the Indoor Swap Meet, remembered the applicant had made notes of his visit on June 18, 1991. The applicant wanted to lease space to sell chili. The applicant stated that he was representing Anderson Studios. Mr. Dean [Levy] felt it was odd that Anderson Studios would be selling chili, but to get rid of the applicant Mr. Weeks agreed to write down

all the information. As a contact number, the applicant gave the telephone number of Anderson Studios.

6. The applicant's nephew Anthony M. Collello corroborated the applicant was not involved in a construction business was him.

7. The applicant has the burden of proof by a preponderance of the evidence to establish all the material elements of his claim. *Russell v. Industrial Commission*, 104 Ariz. 548, 456 P.2d 918 (1969). The term "preponderance" merely means that the testimony which points to one conclusion appears to the trier of fact to be more credible than the testimony which points to the opposite one. *Brooks v. Industrial Commission*, 24 Ariz. App. 395, 539 P.2d 199 (1975). In the instant case the applicant must establish he sustained an injury by accident arising out of and occurring in the scope of his employment with the defendant employer herein on June 18, 1991.

8. It appears there is no dispute the applicant suffered injuries in a motor vehicle accident on June 18, 1991. The only disputes remaining appear to be the nature of the business relationship and the applicant's activity on the day of the accident.

9. The named employer herein asserts: (1) the applicant was not an employee, but rather was an independent contractor; and (2) in any event, the applicant was not engaged in business for this employer at the time of the accident.

10. The statutory guideline for determining whether a worker is an employee or and [sic] independent contractor are set forth in A.R.S. §23-902 (C):

> A person engaged in work for another, and who while so engaged is independent of the employer in the execution of the work and not subject to the rule or control of the person for whom the work is done, but is engaged only in the performance of a definite job or piece of work, and is subordinate to the employer only in effecting a result in accordance with the employer's design, is an independent contractor, and an employer within the meaning of this section.

A person regularly employed in an employer's business is an employee for workers compensation purposes "unless the worker is not subject to the employer's control, if hired only to perform a definite job, and is subordinate soley [sic] in effecting a desired result. *Central Management Co. v Industrial Commission*, 162 Ariz. 187, 190, 781 P.2d 1374 (App. 1989). The right of control includes the duration of employment, the method of payment, who furnished the equipment, the right to hire and fire, who bears responsibility for workers' compensation insurance, the extent to which the employer may exercise control over the details of the work, and whether the work was performed in the usual and regular course of the employer's business. *Home Insurance Co. v Industrial Commission*, 123 Ariz. 348, 599 P.2d 801 (1979). Because of the remedial nature workers' compensation law, the definition of an employee is liberally construed. *Central Management*, above. In determining whether this applicant fits within the statutory definition of employee, the totality of the circumstances of his work must be examined. *See Reed v Industrial Commission*, 23 Ariz. App. 591, 534 P.2d 109 (1975). In the instant case, the applicant was hired on an

open ended basis. He was to be paid a salary of a set amount each month. He furnished a desk and computer, but this was located on the premises of Mr. Anderson's business and all other equipment was furnished by Mr. Anderson. Mr. Anderson had the right to hire (which he did) and fire (which he did not because he owed the applicant money) the applicant. The applicant's suggestion that Mr. Anderson took the responsibility for workers' compensation is undisputed in the record. Mr. Anderson admittedly had the right to excersise [sic] control over the details of the work and would have done so but for the debt he owed the applicant. The work of promoting Anderson Studios was work performed in the usual and regular course of Mr. Anderson's business. Furthermore, the applicant was performing some work (even though it was only "very little") work for Anderson Studios up to the day of the accident, even if the applicant allegedly severed his ties with Mr. Anderson in the first week of June. The totality of these circumstances points to a conclusion the applicant was an employee of Mr. Anderson.

11. The next question is whether the applicant's injuries arose out of and in the course and scope of the applicant's employment. *See* A.R.S. §23-1021(A). "Arising out of" refers to the time, place, and circumstances of the accident in relation to the employment. *E.g., Peter Kiewit Sons' Co. v. Industrial Commission*, 88 Ariz. 164, 354 P.2d 28 (1960); *Scheller v. Industrial Commission*, 134 Ariz. 418, 656 P.2d 1279 (App. 1982). If the applicant's activities while off the employer's premises are in furtherance of the employer's business, the injuries are compensable. *See Pauley v. Industrial Commission*, 109 Ariz. 298, 508 P.2d

1160 (1973). The association between Mr. Anderson and the applicant with respect to the portraiture business was loose and quite amorphous. It was even more so with respect to the chili business. Apparently the applicant, Mr. Anderson and Mr. Levy had talked at one time about forming a company to market Mr. Anderson's chili. Also, the applicant had, with the knowledge and approval of Mr. Anderson, acquired some equipment in furtherance of that goal. As of June 18, 1991 the company had been formed and only some minimal marketing efforts had been made. Although Mr. Anderson alleges the applicant had severed any relationship with the chili venture, it by [sic] appears the applicant's testimony, corroborated by the swap meet general manager, he had not. There is no evidence the applicant went to the swap meet on June 18, 1992 for any reason except in furtherance of Mr. Anderson's interest. Although the applicant was not initially hired to market chili, it seems clear the duties were expanded with the approval of Mr. Anderson. Under these circumstances the applicant's injuries sustained while returning to the office from the swap meet were in the course of employment.

AWARD

THE APPLICANT IS HEREBY AWARDED:

1. Medical, surgical and/or hospital benefits, as provided by law, from June 18, 1991, until such time as his condition related to the industrial injury is determined to be medically stationary.

2. Temporary total and/or temporary partial disability compensation benefits, as provided by law, from June

18, 1991, until such time as his condition related to the industrial injury is determined to be medically stationary.

THIS AWARD IS a judgement lien, pursuant to A.R.S. Sec. 23-907, which provides:

> The payment made from the Special Fund pursuant to the award plus the penalty shall act as a judgement against the employer. The commission shall file the award in the office of the clerk of the superior court in any county in the state and such award shall be entered in the civil order book and judgment docket and when so filed and entered shall be a lien for eight years from the date of the award upon the property of the employer located in the county. Execution may issue thereon within eight years in the same manner and with like effect as if the award were a judgment of the superior court.

NOTICE: Any party dissatisfied with this Award may file a written request for review of the same with the Administrative Law Judge Division of The Industrial Commission within THIRTY (30) DAYS after the mailing of this Award as provided by *Arizona Revised Statutes* Secs. 23-942 D and 23-943 A and B. Unless such written request is made within the time provided, this Award is final.

By /s/ Nancy J. Tyson
NANCY J. TYSON
ADMINISTRATIVE LAW
JUDGE

NJT/tmg

DATED AND MAILED IN TUCSON, ARIZONA, ON THIS 30TH DAY OF OCTOBER, 1992.